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Issue Date: 28 December 2006

CASE NO.: 2005-LHC-01357
OWCP NO.: 01-160167

In the Matter of

T. L.[1]
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Marcia J. Cleveland and Lisa M. Thomas,
Topsham, Maine, for the Claimant

Stephen Hessert (Norman, Hanson & DeTroy),
Portland, Maine for the Employer/Self-Insured

Merle D. Hyman, Senior Trial Attorney and
Frank V. McDermott, Jr., Regional Solicitor,
Boston, Massachusetts, for the Director,
Office of Worker's Compensation Programs,
United States Department of Labor.

Before: Daniel F. Sutton
Administrative Law Judge

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

T.L. (the Claimant), who is employed by the Bath Iron Works Corporation ("BIW") as a marine electrician, brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the "LHWCA"), seeking compensation for lost work days that he contends were caused by occupational asthma. BIW denies liability, arguing that the claimed disability and any lost time were not caused by any work-related injury or disease. In the alternative, BIW seeks liability relief pursuant to the provisions of section 8(f) of the LHWCA in the event that permanent disability compensation is awarded. The Director, Office of Workers' Compensation Programs (the "Director" and "OWCP") opposes BIW's request for liability relief.

The parties were unable to resolve the claim through informal proceedings before the OWCP, and that office transferred the case to the Office of Administrative Law Judges ("OALJ") for a formal hearing in accordance with section 19(d) of the LHWCA. 33 U.S.C. § 919(d). Pursuant to notice, a hearing was conducted in Portland, Maine on November 22, 2005, when all interested parties were afforded an opportunity to present evidence and argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of BIW. The Director did not appear at the hearing but submitted a position statement which was entered into the record as Administrative Law Judge Exhibit 14. TR 7-8. The Claimant and two witnesses called by BIW testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-11 and BIW Exhibits ("EX") 1-38. Hearing Transcript ("TR") at 8-11. At the close of the hearing, the record was held open to allow the parties to offer additional medical evidence and briefs. TR 17-19. Within the time allowed, BIW offered the transcript of deposition testimony taken on January 25, 2006 from Stephen Mette, M.D. which has been admitted without objection as EX 39.[2] Both parties have filed helpful briefs, and the record is now closed.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant is entitled to an award of permanent partial disability compensation for 3.32 weeks of time that he lost from work because of incapacity caused by work-related exacerbations of his asthma. I further conclude that he is entitled to medical care for his work-related and attorneys' fees. Finally, I conclude that BIW has not demonstrated that it is entitled to liability relief from the Special Fund. My findings of fact and conclusions of law are set forth below.

[2] BIW offered the transcript of Dr. Mette's deposition in a letter dated February 8, 2006. The Claimant also offered the transcript of Dr. Mette's deposition into evidence as CX 11 with his post-hearing brief filed on April 25, 2006. Since CX 11 was already assigned to another exhibit admitted at the hearing (*i.e*., notes from Dr. Kahn dated November 17, 2005), Dr. Mette's deposition will be referred to herein as EX 39.

II. The Claim, Stipulations and Issues Presented

The Claimant seeks compensation for 108 days or partial days on which he took unpaid Family Medical Leave Act ("FMLA") leave[3] or paid vacation and sick time because he allegedly was unable to work because of his occupational asthma. Claimant Brief at 1, 8-9; TR 14. At the hearing, the parties stipulated that (1) the claim falls within the coverage of the LHWCA and (2) there was an employer-employee relationship between BIW and the Claimant on May 20, 2004 which is the date of the Claimant's alleged occupational asthma injury. TR 15.[4] The parties also agreed that the issues remaining for adjudication are (1) whether the Claimant's asthma is causally related to his employment at BIW, (2) if causally related, the nature and extent of any disability and (3) whether BIW is entitled to liability relief under section 8(f) of the LHWCA. TR 15.

III. Findings of Fact and Conclusions of Law

A. Background and Work History

The Claimant, who was 46 years old at the time of the hearing, began working for BIW as a grinder in 1988. TR 25. He also participates in "powerlifting" and holds records for his weight class. TR 56-57. After a little more than a year, he began working as a marine electrician, and he has continued in this position until the present time. *Id.* He testified that he began to experience difficulty breathing around 1993 or 1994, especially when climbing ladders on ships. *Id.* at 26. He attributed his breathing problems to exposure to grinding, epoxy paints and welding fumes on the ships. *Id.* In 1997, he was transferred to the South Hyde building at BIW's main shipyard after his doctor restricted him from exposure to welding, grinding and paint fumes. *Id.* at 27-28. He said that the South Hyde building was actually dustier than his previous work environment, but he was generally able to manage his asthma with an inhaler until tinsmiths in the building began using an epoxy paint called "ZRC" that aggravated his symptoms. *Id.* at 28.

In May of 2005, he transferred to BIW's East Brunswick Manufacturing Facility ("EBMF") after a shop steward approached him about replacing a retiree and explained that EBMF was a better environment than South Hyde. *Id.* at 28-29.[5] At EBMF, he does "shop jobs"

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[3] The FMLA is codified at 29 U.S.C. § 2601 *et seq*.

[4] The parties did not offer a stipulation at the hearing regarding the Claimant's average weekly wage at the time of his alleged injury. TR 15. In its post-hearing brief, BIW states that the parties have agreed that the Claimant's average weekly wage is $843.95. BIW Brief at 3. However, the Claimant submits in his post-hearing brief that his average weekly wage, as calculated from payroll records pursuant to section 10(a) of the LHWCA, is $738.88. Claimant Brief at 6. Thus, there is also an issue concerning the correct amount of the Claimant's average weekly wage.

[5] EBMF is not a maritime situs covered by the LHWCA. *See Cunningham v. Director, OWCP*, 377 F.3d 98, 110 (1st Cir. 2004). However, the parties, as discussed above, have stipulated that the claim in this case, which is based on an injury allegedly sustained at the main shipyard before the Claimant transferred to EBMF, is within the jurisdiction of the LHWCA.

in an environment where the air quality is generally "very good" so that between May and November of 2005, he only had to use his inhaler about three times. *Id.* at 29-31. He also missed one day of work during this period due to asthma, leaving around 10:00 on FMLA leave. *Id.* at 31, 33.[6] The Claimant said that he has been doing "very well" since transferring to the EBMF as he is able to walk away on the occasions when he would otherwise be exposed to any paint or fumes. *Id.* at 35-36, 40-41.

Although the Claimant denied any significant problems tolerating the work environment at EBMF, he was summoned to a meeting on November 10, 2005 with Maria Mazorra, M.D., BIW's Chief of Occupational Medicine, to discuss his work restrictions. *Id.* at 36-37. At this meeting, Dr. Mazorra explained to the Claimant and a union steward who accompanied him that she had reviewed his permanent work limitations from Dr. Kahn (*i.e.*, no exposure to dust or fumes; *see* CX 4 discussed, *infra*) and determined that they would have to be changed to allow "minimal" exposure, defined as up to nine minutes per hour, or BIW would not be able to accommodate his restrictions. *Id.* at 37-39; 65-76 (testimony of Dr. Mazorra).[7]

The Claimant testified that he had been taking FMLA leave for about four years at the time of the hearing and that he has never taken FMLA leave for any reason other than his asthma. *Id.* at 34-35. He also testified that he "prefer[s] to take vacation time and not use so much of the FMLA" because of his concern that his usage of FMLA leave might be perceived as excessive and lead to denial. *Id.* at 128. He stated that he cannot identify the vacation days that he used for asthma; that he most commonly used partial vacation days when he had to leave work because he had been exposed to an irritant, although he has taken full vacation days for asthma; and that he has taken partial vacation days since 2001 for reasons unrelated to asthma but is unable to recall specific occasions when this occurred. *Id.* at 128-129.

With regard to the FMLA and vacation time taken by the Claimant, attendance records and testimony from Steven Bernier, BIW's manager of craft administration, reflect the following leave usage: 1998 – 6 full days of FMLA leave totaling 48 hours, 7 partial days of FMLA leave totaling 20.5 hours, and 7 partial days of vacation/comp time totaling 36 hours; 1999 - 2 partial days of FMLA leave totaling 6 hours and 13 partial days of vacation/comp time totaling 43.3 hours; 2000 – 0 hours of FMLA leave, 4 partial days of vacation/comp time totaling 12 hours and 6.5 days of totaling 52 hours of excused time a "yard injury" that is not otherwise identified in the record; 2001 - 5 full days of FMLA leave totaling 40 hours, 9 partial days of FMLA leave totaling 25.8 hours, and 7 partial days of vacation/comp time totaling 21.3 hours; 2002 - 1 full day of FMLA leave totaling 8 hours, 8 partial days of FMLA leave totaling 27.5 hours, and 6 partial days of vacation/comp time totaling 20 hours; 2003 - 6 partial days of FMLA leave totaling 11.5 hours, and 8 partial days of vacation/comp time totaling 26.7 hours; 2004 - 3 partial

[6] As set forth below, the Claimant's time and attendance records through August 2, 2005 reflect that he used only 1.5 hours of FMLA leave during the first seven months of 2005. EX 23.

[7] The deadline for the Claimant to provide BIW with revised work limitations was November 29, 2005, one week after the hearing. TR 19, 39. As discussed in greater detail below, Dr. Kahn declined to alter the Claimant's limitations on November 17, 2005. CX 11. As of the date of the hearing, the Claimant continued to work at the EBMF, but the parties recognized that his employment situation could change in the near future. *Id.* at 16-20. Nevertheless, they preferred to litigate the present claim and to address any future change in circumstances in modification proceedings under section 22 of the LHWCA. *Id.*

days of FMLA leave totaling 5 hours, and 11 partial days of vacation/comp time totaling 24 hours; and 2005 (through 8/2/05) – 1.5 hours of FMLA leave on one day and 9 partial days of vacation/comp time totaling 16 hours. EX 16-23; TR 120-124.

B. Medical History and Work Restrictions

The medical records indicate that the Claimant first sought attention for respiratory complaints in 1990 when he went to BIW's Employee Health Department to report progressively worsening shortness of breath of one week's duration. CX 7 at 58. He was given a chest x-ray and pulmonary function test ("PFT"), both of which were normal. *Id.* No diagnosis was made, and there is no indication of any further pulmonary evaluation or treatment until 1992. *Id.*

The next record of medical intervention for respiratory problems is an initial evaluation dated May 7, 1992 by George A. Vraney, M.D. of Central Maine Pulmonary Associates. CX 4 at 26. At that time, the Claimant reported progressive shortness of breath both at rest and with exercise, particularly walking, but less so at work or when exercising with weights. *Id.* Allergy skin testing reported showed "significant reactivity" to dust, mites and birch pollen, and Dr. Vraney's impression was chronic rhinitis partially secondary to birth and dust mite allergy. *Id.*

The Claimant returned to Central Maine Pulmonary Associates in February of 1996 with complaints of a recent worsening of his symptoms, including "episodes of more severe shortness of breath at work where he is exposed to epoxy fumes or other people's cigarette smoke, becoming actually dyspneic until he removes himself from the environment." CX 4 at 28. He was evaluated by Ralph V. Harder, M.D. who noted an employment history of exposure to grinding fumes, paint fumes and burning [epox]y" at BIW, prior employment where he sprayed weed control chemicals and insecticides, and a past smoking history of 2.5 packs per day which ended 15 years earlier. *Id.*[8] Dr. Harder's impression was exertional dyspnea of unclear etiology, but he added that "[c]ertain elements of the history suggest work-related cause and occupational asthma in this patient's exposure history." *Id.* at 29. On February 22, 1996, Richard M. Kahn, M.D., another physician at Central Maine Pulmonary Associates, wrote a "To Whom It May Concern" letter in which he recommended that if inhaled breathing medications do not prove effective in controlling the Claimant's symptoms on the job, "he be placed in an environment at work that does not require the heavy dust, paint spray, and particulate matter that he is exposed to when working on a ship." *Id.* at 27.[9] One year later, Dr. Kahn wrote to BIW that notwithstanding the Claimant's "strong desire to remain at his location on the ship," medication had proved incapable of controlling his symptoms, and he stated that the Claimant "should not work on a boat, being exposed to dust, welding, paint, or grinding fumes on a permanent basis." *Id.* at 31. In 2004, Dr. Kahn stated that the Claimant had a "history of chronic rhinitis, asthma, with multiple triggers, including exercise, allergy and likely occupational exposure, with some worsening symptoms over the past several months." *Id.* at 34. He also stated that the Claimant "had no previous symptoms related to asthma prior to his work at BIW, making the possibility of

[8] Both copies of Dr. Harder's report in the record are partially illegible so that the bracketed letters are unclear. However, it appears from context that the illegible reference is to epoxy.

[9] It appears from BIW's records that these limitations were accepted in 2000. EX 25 at 52.

an occupational exposure as a cause . . . very likely." *Id.*[10] In a note dated April 4, 2005, Dr. Kahn stated that the Claimant's "increase in shortness of breath also is an indication that there is likely something in his workplace environment that is leading to a significant allergic reaction or he is developing a component of occupational asthma." *Id.* at 37. Dr. Kahn also reported at this time that he recommended that the Claimant try a medication called "Xolair" to control his symptoms and that the Claimant was concerned about possible side effects including negative impact on his powerlifting activities. *Id.* at 37-38.[11]

On November 14, 2005, Dr. Mazorra wrote to Dr. Kahn, requesting clarification of the Claimant's work limitations:

> I am writing to obtain clarification whether in your opinion these limits are to remain unchanged, or whether these could be liberalized to allow minimal to occasional exposure. He has demonstrated ability to tolerate some dust & fume exposure. The other option is to provide him with a respirator to use as needed. We have found that our asthmatics do very well using either negative or positive pressure respirator.
>
> If the limits are to remain as written, I will inform his management of the need to abide by these limitations. Management may or may not be able to accommodate him.

EX 38. Dr. Mazorra also questioned Dr. Kahn's diagnosis of work-related asthma, noting that she typically performs pre- and post-shift PFTs to determine causation and that on the one occasion when the Claimant complained of a work-related airway irritation from exposure to something "ammonia-like" in 2001, his PFT was normal, "[c]ertainly not supportive of an asthmatic event." *Id.* In response, Dr. Kahn declined to revise the limits, providing the following explanation:

> [The Claimant] returns for followup, last seen in 6/05. He remains a 46-year-old white male with a history of chronic rhinitis, and asthma with multiple triggers, including exercise, allergies, and occupational exposure. He was having continued worsening symptoms over the last year in part related to increased dust exposure at work and related to certain fumes, especially paints and other solvents. We had recommended a trial of Xolair which began in June, and he believes that this medicine has had a great deal of benefit for him and has improved his dyspnea and his reaction to the usual irritants at work. I do remain concerned about epoxy fumes playing a significant role in his symptoms. I again should emphasize in this note that he did not have asthma until he was in the workplace and has had gradually worsening symptoms since 1991. He has significant irritability of symptoms of dyspnea, both during and after work and his lung function has

[10] It is noted that the Claimant testified that he has experienced asthmatic symptoms outside of work after extended walks, exposure to strong odors such as perfume and exposure to hot or cold weather. TR 49-50, 56.

[11] The Claimant testified at the hearing that he had been placed on Xolair treatment by Dr. Kahn. TR 39-40. *See also* CX 11 and CX 4 at 39 showing the Claimant received Xolair injections on June 27, 2005.

> remained preserved. He is currently doing a Workmen's Comp case. Unfortunately, they did not ask him to do peak flows at work. I would estimate that despite the fact his peak flows were 800 several years ago that his peak flows currently would be in the 600 range, allowing him to use a peak flow meter. He did have a positive methacholine challenge test, although that methacholine responsiveness has decreased. His asthma control test score is 12 today. He continues to have dust exposure and some fume exposure in the workplace. He notes that the welders usually use sucker tubes nearby to decrease his exposure to welding. Unfortunately, for [the Claimant], his occupational exposures have increased his sensitivity to a number of irritants. I believe he is currently in the best location to manage his condition, as his previous environments have triggered significant symptoms. I believe if I decrease his limitations, he runs the risk of worsening his asthma symptoms.

CX 11 at 1. Dr. Kahn reiterated his diagnosis, stating that the Claimant had a "history of chronic rhinitis, asthma, with multiple triggers, including exercise, allergy, and occupational exposure with significant worsening over the past 6 months to a year, likely on the basis of occupational exposure, including dust and epoxy, noting significant subjective improvement since starting Xolair." *Id.* He also took issue with Dr. Mazorra's suggestion that the Claimant use a respirator and with her skepticism regarding his diagnosis of workplace-related asthma:

> There are several issues that need comment. There is a statement that use of a respirator could be beneficial in a patient with occupational asthma. It is my understanding of the literature that masks and filters do not prevent asthma attacks and respirable particles would be below the range of many filters. Changing [the Claimant's] limitations to 9 minutes per hour would significantly increase his exposure to workplace irritants and lead to a significant risk to [his] health.
>
> It was mentioned in the following paragraph that his lung function was not decreased after complaining of irritation in his airway from smelling a pneumonia-like substance. It should be stated here that pulmonary function testing alone is not diagnostic of asthma. Variability of symptoms, elevated IgE level, positive methacholine challenge need to be taken into account. The patient's current ACT score of 12 also shows that his asthma is not under control. An ACT score of less than 19 demonstrates that his asthma control currently is poor. It was noted that he had a post-exposure FEV1 and FVC that were normal. Unfortunately, his post-exposure FEV1 was not at the site of his exposure. He was required to ambulate from the site and have his pulmonary function testing performed at sometime later which could allow time for the significant challenge from an airborne irritant to resolve.

Id. at 2. As noted above, the outcome of the controversy over the Claimant's work limitations and their impact on the availability of continued employment at BIW is not disclosed by this record.

BIW had the Claimant evaluated on May 27, 2005 by Stephen A. Mette, M.D. CX 8. Dr. Mette's diagnosis was extrinsic (allergic) asthma, and he stated that it is difficult to assess whether the asthma is workplace-induced. *Id.* at 94. However, he further stated that the Claimant's asthma does require environmental control, both at work and at home, and that the Claimant "should take every precaution to limit workplace exposure to fumes, strong odors, dust." *Id.* Dr. Mette's deposition was taken on January 25, 2006. EX 39. He testified that he is board-certified in internal medicine, pulmonary disease and critical care medicine. *Id.* at 3-4. Dr. Mette said that although the Claimant did not have any asthmatic signs or symptoms during his examination, his likely diagnosis is asthma, based on his history and medical records. *Id.* at 10. He explained that the Claimant's asthma is a permanent condition because it is "atopic" or allergic in nature and while his allergies are treatable, "he will always have the propensity to have an asthmatic exacerbation if not controlled." *Id.* at 11. Reagrding the cause(s) of the Claimant's asthma, Dr. Mette testified,

> There is a suggestion in one of the notes that workplace exposure may be exacerbating his symptoms, but both notes also point out that his symptoms appear to extend beyond the workplace. So I think both notes leave the door open but suggest that this is not just a workplace phenomenon.

Id. at 12. Based on his review of the medical records, Dr. Mette said that it is his opinion that the Claimant had a permanent asthmatic condition as early as 1992. *Id.* at 13-14. He also testified that it is his opinion within a reasonable degree of medical certainty that the workplace did not cause the Claimant's asthma, but that "there is a possibility that the workplace exacerbated his preexisting condition" and "may have irritated his airways and caused symptoms of his underlying asthmatic condition." *Id.* at 14. Dr. Mette was then asked to read the portions of the hearing transcript where the Claimant described his current work environment at EBMF and general tolerance of conditions there, and he testified that it is appropriate for the Claimant to continue in his current job as "[i]t sounds like he has worked out a work arrangement where he's not bothered in the workplace." *Id.* at 15-16. He later testified that the Claimant's methocholine challenge test results indicates that his asthma is either well-controlled on medication or relatively mild. *Id.* at 25-28.

Dr. Mette said that there was no evidence in the Claimant's history or medical records that his asthmatic condition had changed or worsened since 1996. *Id.* at 16-17. He also stated that the Claimant "has not developed a permanent condition due to workplace exposure . . . [and] does not have a permanent exacerbation of his asthma due to workplace exposure." *Id.* at 17, 21-22. Dr. Mette discussed the Claimant's medications and testified that they provide him with an acceptable level of control of his asthma. *Id.* at 17-19. Dr. Mette was questioned about the test results showing an allergy to dust mites, and he said that a dust mite allergy is typically associated with a home rather than workplace environment. *Id.* at 19. He was asked about exercise-induced asthma and responded that the Claimant's activities as a powerlifter do not indicate that his asthma is exercise-induced, only that it is controlled well enough to permit exercise. *Id.* at 20-21. On cross-examination, Dr. Mette testified that the Claimant has asthma rather than reactive airways dysfunction, which he described as temporary reaction to a triggering exposure, and he agreed that exposure to fumes from drying or burning epoxy paints can trigger a reaction in an asthmatic. *Id.* at 22-25.

Dr. Mazorra, BIW's Medical Director, testified that she is an allopathic physician with board-certification in occupational medicine, and she is currently in the process of recertifying for internal medicine. TR 62. She also has a master's degree in public health from Harvard. *Id.* She testified that the medical department at Bath Iron Works treats about 80 percent of the acute injuries in-house, that she is responsible for surveillance, regulatory compliance and other oversight responsibilities which occupy about 50 percent of her time, and that workers' compensation injuries and acute injury management take the other 50 percent of her time. *Id.* at 63. She has never treated or examined the Claimant. *Id.* at 64. She testified that she had reviewed the Claimant's work limitations and that the Claimant's current job at EBMF was not "technically" within his limits because "there is no work place at BIW, including my office, that has no dust." *Id.* at 65-66. Dr. Mazorra testified that she met with the Claimant on November 10, 2005 because she wanted to get Dr. Kahn to update or clarify the Claimant's limits so that it would be clear that he could continue working. TR 69-76. Dr. Mazorra then addressed Dr. Kahn's November 17, 2005 note and said that it contained a number of inaccuracies . . . ." *Id.* at 77-78. First, she said that she disagreed with Dr. Kahn's suggestion that BIW had declined to perform pre- and post-shift PFTs in order to better assess the impact of workplace exposures. *Id.* at 78-79.[12] Second, she testified that Dr. Kahn attempted to limit the Claimant from working aboard ships and that although BIW will honor limitations such as avoidance of fumes, she routinely refuses to allow outside physicians to dictate particular job assignments, except in extraordinary cases. *Id.* at 79, 88-97. Third, she stated that Dr. Kahn's comments about the effectiveness of respirators was "totally erroneous" because respirators are designed to remove respirable irritants, and there are "many people in the shipyard who are asthmatics who do very well with a respirator" which can be a "positive pressure" design that involves no breathing effort. *Id.* at 80. Fourth, she rejected Dr. Kahn's opinion that relaxing the Claimant's limitations would pose a significant health risk given the fact that the Claimant is already tolerating minimal levels of exposure on the job. *Id.* Finally, Dr. Mazorra testified that the Claimant's PFTs since 1988 have always been well within normal limits and show no significant changes since 1988 though she conceded that "asthma is a reversible disease and it depends on when you capture the person." *Id.* at 81-82.

C. Is the Claimant's asthma causally related to his employment at BIW?

To prove that there is a causal connection between his asthma and his employment, the Claimant bears the initial burden of making out a *prima facie* case. That is, he "must at least allege an injury that arose in the course of employment as well as out of employment" and show that he "sustained physical harm and that conditions existed at work which could have caused the harm." *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), quoting *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). "[T]he claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath*

[12] Dr. Kahn did not accuse BIW of refusing to conduct PFTs. His criticism was directed to the fact that the Claimant had to travel from his worksite where the exposure and reaction occurred to the testing location, thus allowing time for the reaction to subside. CX 11 at 2. On cross-examination, Dr. Mazorra acknowledged that asthma is reversible, but she insisted that it is not so reversible that that the effects of an exacerbation at the worksite would not still be evident by the time that the Claimant walked to her office for a PFT. TR 103.

Iron Works Corporation v. Preston, 380 F.3d 597, 605 (1st Cir. 2004) (*Preston*) (underlining added). In this case, the Claimant's treating pulmonary physician, Dr. Kahn, and BIW's pulmonary expert, Dr. Mette, both agree that the Claimant has asthma, and that his exposure to irritants at BIW such as epoxy paint fumes could have aggravated or exacerbated his asthmatic symptoms. A work-related aggravation of a pre-existing condition qualifies as an injury under the LHWCA. *Preston*, 380 F.3d at 605, citing *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir.1981); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir.1986). Therefore, based on this record which additionally shows that the Claimant's asthma did not become symptomatic until after he commenced employment at BIW, I find that the Claimant has introduced sufficient evidence to make out a *prima facie* case that his asthma arose out of and in the course of his employment at BIW.

Because the Claimant has made out a *prima facie* case, he is entitled to a presumption that his injury or disease was caused by working conditions and is, therefore, compensable under the LHWCA. *Preston*, 380 F.3d at 605; *Brown*, 194 F.3d at 5. Consequently, the burden shifts to BIW, as the party opposing entitlement, to "rebut the presumption with substantial evidence that the condition was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). Under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment, for this would be an impossible burden; it is enough that it produce medical evidence of "reasonable probabilities" of non-causation. *Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 675 (1st Cir. 1998). *See also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary.'"), *cert. denied*, 540 U.S. 1056 (2003).

As rebuttal, BIW relies on the medical opinions offered by Dr. Mette.[13] As discussed above, Dr. Mette testified that even though workplace exposures did not "cause" the Claimant's asthma, it is possible that workplace exposures "exacerbated" a preexisting asthma, irritated his airways and caused the asthma to become symptomatic. EX 39 at 14. Later in the deposition, he denied that the Claimant's asthma had worsened since 1996 or that he had developed a "permanent" condition as a result of workplace exposures. *Id.* at 16-17, 21-22. On the other hand, he also testified that the Claimant's asthma is a permanent condition because the Claimant will always have a propensity for exacerbations if not controlled, and that exposure to fumes from burning or drying epoxy paint can trigger a reaction in an asthmatic patient. *Id.* at 11, 22-25. While this testimony is less than crystal clear and, in some important respects, inconsistent, it appears to be Dr. Mette's opinion that the Claimant's occupational exposure to irritants such

[13] While BIW also presented Dr. Mazorra's testimony, it acknowledges that she never examined or treated the Claimant and that her testimony "was simply about her knowledge as an occupational medical specialist and about the issue concerning Mr. Lane's limits." BIW Brief at 11. Accordingly, Dr. Mazorra's testimony has not been considered herein as rebuttal of the Claimant's *prima facie* showing that his asthma is causally related to his employment.

epoxy paint fumes may have irritated his airways and caused his preexisting asthma to become symptomatic, but such exposure has not worsened the Claimant's asthma since 1996 or "caused" any permanent condition. Taken at face value, this is insufficient to rebut the presumption. By conceding that exposures to irritants at BIW could have exacerbated the Claimant's pre-existing asthma and caused it to become symptomatic, Dr. Mette actually supports invocation of the presumption based on the aggravation doctrine. Though he denied any worsening since 1996 or any work-related permanent condition, these opinions address the nature and extent of any disability and not whether the Claimant's asthma arose out of and in the course of his employment as that concept is defined in the controlling case law. Moreover, Dr. Mette's opinions on worsening and permanency are inconsistent with his earlier testimony that the Claimant's asthma is a permanent condition which workplace exposures could have caused to become symptomatic. In other words, if the Claimant's asthma was asymptomatic until workplace exposures caused or contributed to the onset of symptoms, how can Dr. Mette maintain that there was no work-related worsening? Dr. Mette also raised the possible contribution of a non-occupational dust mite allergy, an etiology considered by other physicians, but the fact that conditions in the workplace at BIW are not the sole or primary cause does not rebut the presumption of causation. *See Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295-296 (D.C. Cir. 1982) (evidence of additional non-occupational factors which do not dispose of a possible occupational contribution insufficient to rebut presumption). *See also Fortier v. General Dynamics Corp.*, 15 BRBS 4, 9-11 (1982).

Based on the foregoing analysis, I find that BIW has not met its burden of producing substantial evidence that the Claimant's asthma was not aggravated by conditions in the workplace. Accordingly, I conclude that the Claimant has successfully established that his asthma arose out of and in the course of his employment and is, therefore, compensable under the LHWCA.

D. What is the nature and extent of any disability resulting from the Claimant's asthma?

The LHWCA defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). Disability determinations involve "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

1. Nature of Disability

Dr. Mette has characterized the Claimant's asthma as a permanent condition that will always be susceptible to aggravations. The evidence also establishes that his symptoms have persisted for a lengthy period (approximately 14 years), and there is no evidence that there is any medical expectation at this point of significant future improvement. Under these circumstances, I find that any disability is permanent in nature. *See Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979).

2. Extent of Disability

A claimant establishes a *prima facie* case of total disability by showing that he is unable to return to his usual employment because of a work-related injury. *Preston*, 380 F.3d at 608. Here, the Claimant contends that he is entitled to be compensated for 108 days of work that he has missed from work since 1998 due to asthma attacks. Claimant Brief at 8. He seeks compensation for all days on which he took FMLA leave and all days on which he took partial paid leave. *Id.* at 8-9. BIW counters that the Claimant should be awarded no compensation because he has failed to show that there were any days in 2004 or 2005 on which he took FMLA leave and because he was not able to identify any particular days on which he took paid vacation time because of an asthma attack. BIW Brief at 22-24. BIW also states that pursuant to section 6(a) of the LHWCA, the Claimant cannot be awarded compensation for the first three days of disability. *Id.* at 24.[14]

Given the fact that the Claimant was unable to identify any particular day when he took paid leave because of a work-related asthma attack, and the fact that he admitted taking partial days of paid leave for reasons unrelated to asthma, I find that his testimony is too vague and unreliable to meet his burden of proving that any of the days for which the records show that he took less than eight hours of paid leave were occasions when he was unable to perform his usual employment because of work-related disability. The days on which he used unpaid FMLA days are a more difficult proposition. The Claimant credibly testified that he only used FMLA leave for his asthma, and BIW presented no contrary evidence. However, I find that this does establish that all days on which the Claimant used FMLA leave were days that he was unable to perform his usual employment because of work-related disability. I make this finding based on the following considerations. First, the record shows that there are non-occupational factors, such as a dust mite allergy and exercise, which also exacerbate the Claimant's asthma. Second, the Claimant did not testify that all days on which he used FMLA leave were because of a work-related exacerbation of his asthma; he simply said that he only used FMLA leaves because of his asthma. Third, his testimony strongly suggests that when an asthmatic reaction was provoked by some exposure at work, he would leave the job, taking a partial day of leave. Therefore, I find it reasonable to conclude that days on which he took a <u>full</u> day of FMLA leave were not related to a workplace exposure that prevented him from continuing work, unless the day immediately followed a day on which he took a partial day (*i.e.*, less than eight hours) of leave. That is, I find that the most reasonable inference to be drawn from the record is that it is more likely than not that a day when the Claimant used a full day of FMLA leave which did not immediately follow a day on which he used less than eight hours of leave is attributable to a non-occupational exacerbation. On the other hand, I also find it reasonable to infer that eight hours of FMLA leave immediately following a partial day of leave is more likely than not attributable to a

[14] Section 6(a) of the LHWCA states,

> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 7 [33 USC § 907]: Provided, however, That in case the injury results in disability of more than Fourteen days the compensation shall be allowed from the date of the disability.

33 U.S.C. § 906(a).

workplace aggravation that forced the Claimant to leave work. The record shows only one full day of FMLA leave (February 9, 1998) which preceded a partial day of leave (4 hours of vacation/comp on February 8, 1998). EX 16 at 25. Thus, I find that the Claimant has only met his *prima facie* burden with respect to this one full day of FMLA leave. In addition, I find that the Claimant has established that he was unable to perform his usual employment due to work-related disability for 20.5 hours in 1998, 6 hours in 1999, 25.8 hours in 2001, 27.5 hours in 2002, 11.5 hours in 2003, 24 hours in 2004 and 1.5 hours in 2005.[15] In sum, the Claimant has made a *prima facie* showing that he was totally disabled for 132.8 hours or 16.6 days between January 1, 1998 and August 2, 2005.[16]

Since I have determined that the Claimant has made out a *prima facie* case of total disability for 16.6 days, the burden shifts to BIW to show that suitable alternative employment was readily available on these dates in the Claimant's community for an individual with the same age, experience, and education. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991). Though BIW correctly points out that the Claimant's disability has now been effectively accommodated by the transfer to EBMF, it offered no evidence that there was suitable alternative employment available on the identified dates on which he used FMLA leave due to a work-related exacerbation of his asthma. Therefore, I find that the Claimant has established that he was disabled for a total of 16.6 days. However, I further find that, contrary to the Claimant's argument, his disability on these 16.6 days is properly considered partial, not total, because the evidence clearly demonstrates that the Claimant does not have a total inability to earn the wages of his usual employment.

E. Entitlement to Compensation

The Claimant filed his occupational asthma claim under the LHWCA on May 24, 2004, identifying May 20, 2004 as the date of injury. EX 2. As asthma is treated as an occupational disease, an occupational asthma claim is subject to the two-year statute of limitations established by section 13(b)(2) of the LHWCA. *See Gencarelle v. General Dynamics Corp*., 22 BRBS 170, 173 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). LHWCA claims are presumed to be timely filed, and BIW has not challenged the timeliness of the claim or otherwise met its burden of demonstrating noncompliance with the filing requirements. *SeeBath Iron Works Corp. v. U.S. Department of Labor*, 336 F.3d 51, 57 (1st Cir. 2003).[17] Since the claim was timely filed, and since laches is not available as a defense under the LHWCA, the Claimant is entitled to be compensated for the full extent of his disability without regard to the date on which the claim was filed. *See Simpson v. Bath Iron Works Corp*., 22 BRBS 25, 27-29 (1989).[18] Therefore, I

[15] These hours represent the total hours of FMLA leave taken on partial days during the years indicated. EX 16-23.

[16] There are a total of 124.8 hours of FMLA leave on partial days plus the one full day on February 9, 1998.

[17] The Director asserts that "it is DOL's position that the date of injury is well before the May 20, 2004 date alleged and that the claim may, in fact, be untimely." ALJX 14. However, the Director did not participate in the hearing, and it has introduced no evidence to rebut the presumption that the claim was timely filed.

[18] Note is made of BIW's argument that benefits can only be awarded in this case if the court find that the Claimant suffered a work-related aggravation of his preexisting asthma in 2004. BIW Brief at 26. BIW also points out that the record contains no evidence that the Claimant suffered any aggravation in 2004, although that is the date of

will award the Claimant 16.6 days of permanent partial disability compensation which, pursuant to section 8(c)(21) of the LHWCA, will be based on two-thirds of the difference between the Claimant's average weekly wage and his wage-earning capacity. 33 U.S.C. § 908(c)(21). The Claimant's average weekly wage, as correctly calculated by his attorney under the formula set forth in section 10(a) of the LHWCA, is $738.88,[19] and his wage-earning capacity for the 16.6 days under consideration was zero. Therefore, he is due compensation for the lost days at the rate of $92.59 per week. The three-day waiting period imposed by section 6(a) is not applicable because the disability has extended for more than 14 days. 33 U.S.C. § 906(a). The Claimant's aggregated disability period of 16.6 days equals 3.32 weeks based on a 5-day week, so his total compensation due is $1,635.40.

Prejudgment interest is normally added to compensation awards made under the LHWCA to ensure that the claimant is not prejudiced by an employer's failure to timely pay compensation. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The first installment of compensation under the LHWCA becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b) (2001). In this case, the Claimant gave notice of his occupational asthma to BIW and filed his claim on May 24, 2004. However, notice that he was claiming compensation for specific dates on which he lost time back to 1998 was not made until the hearing on November 22, 2005.[20] Therefore, interest shall be assessed as of the date the Claimant's compensation became due (*i.e*., beginning on the fourteenth day after November 22, 2005). *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 907-908 (5th Cir. 1997). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

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injury alleged in the claim. *Id.* BIW is right that the claim initially filed did not specifically allege that the Claimant had lost time due to occupational asthma prior to 2004. BIW is right that the claim filed in 2004 did not allege that the Claimant was seeking compensation for lost time dating back to 1998. However, hearing on LHWCA claims may be expanded to allow consideration of new issues if the evidence presented warrants their consideration. 20 C.F.R. § 702.336(a); *Emery v. Bath Iron Works Corp*., 24 BRBS 238, 242-43 (1991). *See also U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 613 (1982) (considerable liberality usually is shown in allowing the amendment of pleadings to correct defects, unless the effect is one of undue surprise or prejudice to the opposing party. The claim in this case went through considerable evolution as it wound its way to hearing, and there is no question that BIW had adequate notice by the time of the hearing that a claim was being made for lost time back to 1998. Indeed, BIW produced the Claimant's attendance and absence records, called Mr. Bernier to testify about these records and specifically addressed the claim for lost time prior to 2004 in its post-hearing brief. BIW Brief at 23-24. On this record, I find that the claim for lost time back to 1998 was reasonably conveyed to BIW and fully litigated at the hearing. *See Downey v. General Dynamics Corp*., 22 BRBS 203, 205 (1989) (a valid claim under the LHWCA is a communication that reasonably conveys the message that a claim is being filed).

[19] *See* Claimant Brief at 9-11.

[20] *See* note 17, *supra*.

F. Entitlement to Medical Care

Pursuant to section 7 of the Act, BIW is responsible for providing reasonable and necessary medical care for the Claimant's work-related asthma. 33 U.S.C. § 907(a); *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001). While the Claimant introduced billing records from Dr. Kahn, he has made no claim for reimbursement of these expenses and, as BIW points out, there is no evidence establishing that the Claimant complied with the requirements of section 7 to impose liability for these costs on BIW. BIW Brief at 25. Accordingly, BIW will be ordered to provide reasonable and necessary medical care, but the order will not include payment of these bills.

G. Special Fund Relief

As an alternative to its position that no compensation is owed to the Claimant, BIW seeks relief from its compensation liability pursuant to section 8(f) of the LHWCA which limits an employer's liability for disability or survivor's compensation to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f); *Lawson v. Suwannee Fruit & Steamship Co*., 336 U.S. 198, 200 (1949); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 39-40 (1st Cir.1982) (*Sachetti*). Section 8(f) first requires BIW to first prove that the Claimant had a manifest permanent partial disability prior to the injury which, in combination, caused the claimant permanent total disability. The pre-existing condition does not have to prevent the employee from working in order to qualify as a disability for section 8(f) purposes, but it must be a medical "condition" and "not merely an unhealthy behavior likely to lead to a condition." *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 50 (1st Cir. 1997) (*Johnson*) (citing *Sacchetti* where the Court held that a moderate smoking habit for ten years prior to development of work-related asbestosis did not constitute a qualifying prior permanent partial disability). Additionally, "the condition must exist before the work-related injury; a disability that occurs simultaneously will not meet the requirement." *Id.* And, simply showing a prior injury is not enough. "[T]he employer must show that the disability is serious enough to motivate a cautious employer either not to hire or to fire employee because of the 'greatly increased risk of employment-related accident and compensation liability.'" *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 435-436 (1st Cir. 1991) (*Legrow*) (quoting *C & P Tel. Co. v. Director, Office of Workers' Compensation Programs,* 564 F.2d 503, 513 (D.C. Cir. 1977)). Finally, if BIW establishes that the Claimant had a manifest pre-existing disability, it must "show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone." *Johnson* at 51. "A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone." *Id.* That is, the "employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury." *Id.* "Thus, an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which coverage under the LHWCA is sought." *Id.* Absent this type of evidence, a court is unable to adjudicate whether the worker's disability is made materially and substantially greater by the pre-existing condition. *Id.* at 52.

The District Director recommended that BIW's application for Special Fund relief be denied based on the absence of any showing that the Claimant had a manifest pre-existing disability. ALJX 1. Before this court, the Director similarly argues that Special Fund relief should be denied because the evidence shows that the Claimant's asthma did not become manifest until after he was employed BIW and after BIW had become self-insured for compensation liability. ALJX 14.[21] The Director also points out that there is no evidence showing why the subsequent disability is made worse by the pre-existing condition. *Id.* BIW basically agrees with the Director's position, asserting that because there was no work-related exacerbation of the Claimant's asthma in May of 2004, as alleged in the claim, there is no basis for holding the Special Fund liable, and the claim should be denied. BIW Brief at 25. Alternatively, BIW argues that "[i]n the unlikely event that the Court were not to deny the claim outright and in the unlikely event that the Court might consider that there has been a permanent exacerbation of the pre-existing condition, the predicate factors for § 908(f) are clearly established since medical records show that there was a pre-existing manifest condition going back as far as 1991." *Id.* at 26. The medical records do show the presence of an undiagnosed respiratory problem as early as 1990 when the Claimant went to BIW's employee health department with complaints of shortness of breath, but this post-dates the Claimant's hiring and BIW's commencement of self-insurance by two years. Therefore, there is no evidence of a pre-existing condition for section 8(f) purposes. Moreover, the Special Fund does not assume liability until after the responsible employer has paid 104 weeks of compensation. Here, BIW has only been ordered to pay 3.32 weeks of compensation, so the liability of the Special Fund is far from certain, especially in light of the evidence that the Claimant is doing well in his new work environment at the EBMF. For these reasons, I conclude that BIW has not established that it is entitled to liability relief from the Special Fund.

H. Attorney's Fees

The Claimant's attorney, Marcia J. Cleveland, petitions for attorney's fees in the amount of $9,446.50 based on 49.86 hours of work and expenses in the amount of $424.06. BIW contends that no fees or expenses should be awarded because the Claimant is not entitled to benefits. BIW further objects to Attorney Cleveland's $225.00 per hour billing rate on the ground that attorneys in Maine do not customarily receive $225.00 per hour for workers' compensation litigation. Lastly, BIW asserts that Attorney Cleveland made the case unnecessarily complicated "where there is really very little claimed in proportion to the legal effort that has been expended." BIW July 18, 2006 Obj. Ltr. at 2. Attorney Cleveland responds that her billing rate of $225.00 per hour since January 1, 2005 is reasonable based on her experience and skill, and she submitted evidence to show that her billing rate is substantially below that of attorneys with comparable experience. She further responds that any delays in the litigation of the claim were occasioned by the request of both parties or BIW for development of additional evidence. Finally, Attorney Cleveland requests leave to petition for additional fees incurred in defense of her fee petition.

[21] BIW became self-insured for workers' compensation liability on September 1, 1988. *See* ALJX 1 (Feb. 23, 2005 Letter to OWCP at 1).

Section 28(a) of the LHWCA provides that "a reasonable attorney's fee" may be awarded against an employer who denies compensation liability when the claimant utilizes the services of an attorney in the successful prosecution of a claim. 33 U.S.C. § 928(a). The Claimant was successful in establishing entitlement to benefits that had been denied by BIW, so he satisfies the successful prosecution requirement. *See Kinnes v. General Dynamics Corporation*, 25 BRBS 311, 314 (1992) (*Kinnes*) (noting that the legislative history of section 28(a) makes it clear that there is a "successful prosecution" of a claim when the claimant "succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals"). Therefore, BIW's initial objection to the award of any attorney's fees is overruled, and I will now address the remaining objections.

The regulations governing awards of fees to prevailing claimants under the LHWCA provide that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded . . . ." 20 C.F.R. § 702.132(a) (2004). *See also Parks v. Newport News Shipbuilding and Dry Dock Co.*, 32 BRBS 90, 96 (1998) (claimant has burden to produce a fee petition supported by a complete statement of the extent and character of the necessary work done). Thus, a party seeking an award of fees under the fee shifting provisions of a statute such as the LHWCA bears the burden of establishing the necessity of claimed attorney services. *Hensley v Eckerhart*, 461 U.S. 424, 437 (1983) (*Hensley*); *Roach v. New York Protective Covering Co*., 16 BRBS 114, 116 (1984).

I have previously determined that Attorney's Cleveland's $225.00 per hour rate is reasonable, and BIW's objections to this rate have been overruled in other cases. *See e.g., Murphy v. Bath Iron Works Corp*., No. 2006-LHC-00384 (ALJ Ord. Den. Recon. Apr. 26, 2006). BIW presents no new arguments warranting reconsideration of these prior rulings. Accordingly, the objection to Attorney Cleveland's hourly rate is overruled. I also find no merit in BIW's claim that Attorney Cleveland needlessly complicated the case and expended unnecessary time. While it is possible that the case might have required less time on the part of both parties' attorneys had the claim been stated with greater clarity from the outset, there is no question that litigation was necessary since BIW consistently denied any liability. Further, it is noted that despite its position that the case was uncomplex, BIW required 27 pages to lay out its arguments in a post-hearing brief. As instructed by the Supreme Court in *Hensley*, consideration must be given to "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." 461 U.S. at 435. Although the Claimant did not prevail in obtaining compensation for every day of disability identified by Attorney Cleveland from the attendance records, he did succeed on the primary thrust of his claim – namely, that his asthma is work-related and has caused him to lose time from work. Thus, I find that this is a case where the Claimant "has obtained excellent results . . . [and] his attorney should recover a fully compensatory fee." *Id. See also Kinnes*, 25 BRBS at 316 (noting that the amount of an attorney's fee should not be limited to the amount of compensation obtained as such a limitation would drive competent counsel from the field). In my view, the 49.86 hours expended by Attorney Cleveland is reasonable in relation to the level of success achieved. Accordingly, BIW's excessive hours objection is overruled.

Finally, Attorney Cleveland seeks leave to petition for additional fees based on her defense of the fee request. A claimant's attorney may be awarded fees for time spent defending the fee petition. *Byrum v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 833, 837 (1982); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 384 (1979). Attorney Cleveland's response to BIW's objection is two and one-half pages in length, single-spaced. As there is already an adequate record for considering any additional fees, a supplemental petition is unnecessary. Attorney Cleveland's fees will be augmented by one hour at $225.00 based on her successful defense of the fee petition.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, the following compensation order is entered:

(1) Bath Iron Works Corporation shall pay to the Claimant permanent partial disability compensation in the amount of $1,635.40, plus interest computed from December 7, 2005 and based on a rate determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(2) Bath Iron Works Corporation shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the Claimant's work-related asthma or the process of recovery may require;

(3) Bath Iron Works Corporation shall pay attorney's fees and expenses to Marcia J. Cleveland, LLC in the amount of $10,095.56; and

(4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts